89-983

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TONY LEE ADAIR, *et al.*,
Petitioners,

v.

CHERYL CLAY, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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QUESTIONS PRESENTED

1. Whether, contrary to this Court's decisions in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, West Virginia,* 109 S. Ct. 633 (1989), *Cumberland Coal Co. v. Board of Revision,* 284 U.S. 23 (1931), and other cases, intentional and systematic discrimination in the taxation of real property does not violate the guarantee of equal protection in the Fourteenth Amendment to the United States Constitution because that discrimination is not motivated by malice.

2. Whether, contrary to this Court's holdings in *Allegheny Pittsburgh, Hillsborough v. Cromwell,* 326 U.S. 620 (1946), *Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239 (1931), and other cases, taxpayers subject to discriminatory treatment can be denied reduction in the assessment of their property on the ground that they should instead seek to raise the assessments of all other comparable properties in the county.

PARTIES TO THE PROCEEDINGS

Petitioners before this Court, formerly Appellants before the Oklahoma State Supreme Court, and Plaintiffs before the district court of Tulsa County are: Tony L. Adair and Teresa A. Adair; Adams Energy Company; Anderson Development Co., Inc.; Angora Tulsa Enterprises, Inc., and Copper Oaks, Ltd.; Barnett-Range Corp.; The Conley Living Trust; Clint V. Cox; Neal A. Curtis and Ann A. Curtis; Robert B. Emery and Wayne Elizabeth Emery; Garnett Partnership; Samuel J. Goldenhersh and Frieda L. Goldenhersh; Highland Park Associates; Harry S. Jacobs, Jr.; The Kensington Co. Ltd.; Charles I. Murphy; Stephen M. Murphy; Norma K. Murphy; Raymond Terry Sells ; Murphy Properties, Inc.; Aufleger Garrett c/o Murphy Properties, Inc.; Dennis R. Nickel; Ralph E. Peacock; William E. Petton and Patricia A. Petton; Rich's Carriage House; Stephen W. Riess; Riverbend Development Association; Rustic Meadows Dev. Corp. ; Sanditen Investments Ltd.; Sidney E. Scisson and Betty S. Scisson; Ka Keing Sy; Union National Bank; USAA Income Properties Limited Partnership; Wildwood Ltd.; Gary Wingo and Lynda Wingo; Tommy Lee Woods and Linda F. Woods; Darrell F. Dinkel and Cynthia R. Dinkel; Carolyn L. Adams and Gary C. Adams, Co-Trustees; Harold Grigsby; Rich's of Tulsa. No corporate petitioner herein has any parents, subsidiaries, or affiliates.

Respondents before this Court, formerly Appellants in the Oklahoma State Supreme Court, and Defendants in the District Court of Tulsa County are: Cheryl Clay, in her capacity as Assessor, Tulsa County, State of Oklahoma; Susan Harris, Earl Cherry, Robert Butler, and William Pigman, in their capacity as members of the Tulsa County Board of Equalization; John Cantrell, in his capacity as Treasurer, Tulsa County, State of

Oklahoma; and Etta Mae Estes, in her capacity as Acting County Clerk, Tulsa County, State of Oklahoma, and Anita Nesbitt, in her capacity as County Clerk, Tulsa County, State of Oklahoma.

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Petitioners,

v.

CHERYL CLAY, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

Petitioners Tony Lee Adair *et al.* respectfully pray that a writ of certiorari issue to review the judgment and opinions of the Oklahoma Supreme Court entered in the above-entitled proceeding on July 5, 1988 and June 27, 1989.

OPINIONS BELOW

The first opinion of the Oklahoma Supreme Court is reported at 780 P.2d 650 and is reproduced in the appendix ("App.") hereto at App. A-1. The Supplementary Opinion of the Oklahoma Supreme Court is reported at 780 P.2d 658 and is also reproduced at App. A-21. These two opinions in turn considered an unreported order (App. B-1) entered by the District Court of Tulsa County. The order of the Oklahoma Supreme Court denying the Petition for Rehearing is reprinted at App. C-1.

JURISDICTION

Petitioners filed an action in the District Court of Tulsa county, Oklahoma for a refund of *ad valorem* taxes for the tax years 1983 and 1984. Petitioners contended, *inter alia,* that respondent tax authorities had deprived them of their rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. On April 4, 1986, the district court entered judgment in favor of respondents.

Petitioners appealed to the Oklahoma Supreme Court. On July 5, 1988, that court entered its opinion denying petitioners any relief. App. A-1. On July 25, 1988, petitioners filed a timely Petition for Rehearing, which was later supplemented by reference to this Court's decision in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, West Virginia,* 109 S.Ct. 633 (1989). On June 27, 1989, the Oklahoma Supreme Court supplemented its opinion of July 1988 and determined that *Allegheny Pittsburgh* was not controlling, but did not rule on the Petition for Rehearing. App. A-21. On July 3, 1989, petitioners filed a Supplemental and Renewed Petition for Rehearing and accompanying brief. The Oklahoma Supreme Court finally denied the Petition for Rehearing on September 20, 1989. App. C-1. The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. § 1257(3).

PERTINENT CONSTITUTIONAL PROVISION

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl.4.

STATEMENT OF THE CASE

Oklahoma, like 39 other States and thousands of local governments throughout the country, imposes an *ad valorem* tax on the ownership of real property within its jurisdiction. As the amount of the tax levied is based on the value of the property, the taxing authority must ascertain the value of the different parcels of property owned in the State. In Oklahoma and many other jurisdictions, responsibility for that task rests in the first instance with the county assessor.

Petitioners consist of two groups. The first is comprised of owners of properties constructed since 1979, and the second owners of properties revalued since 1979 by the county assessor as part of the cyclical revaluation program. The primary respondent is the county assessor of Tulsa County, who was originally named as defendant in her official capacity.

Under Oklahoma law all property, whether residential or commercial, is in the same tax class and is required to be assessed at a uniform percentage of fair market value. *Cantrell v. Sanders* 610 P.2d 227 (Okla. 1980). The Oklahoma *ad valorem* tax code provides in pertinent part:

> Each county assessor shall commence * * * no later than January 1, 1969, a comprehensive program of revaluation of all taxable property within his respective county. Such programs shall progress at a rate which will result in the revaluation of all taxable property within the county before January 1, 1972. *Each assessor shall thereafter maintain an active and systematic program of revaluation on a continuous basis* and shall establish a revaluation schedule which will result in revaluation of all taxable property within the county at least once each five years. [OKLA. STAT. tit. 68 (1981) § 2481.1(A) (emphasis added).]

Petitioners brought an action in the District Court of Tulsa County alleging, *inter alia,* that the county assessor violated the Equal Protection Clause by valuing or revaluing commercial property and newer residential property at their fair market value every five years while allowing ten to eleven years to pass before revaluing older (i.e., pre-1979) property. After a trial on the merits, the district court found that the county assessor's office had revalued pre-1979 property in 1977 and 1978 but had, for the most part, deliberately failed to revalue this property in 1982 and still had not done so at the time of trial. App. B-3. In contrast, the court found, the assessor placed all newly built homes on the tax rolls at 100% of their fair market value within one year of being built and slated them for reassessment within five years. App. B-5. Petitioners' properties were valued or revalued from 1983 through 1986 at 100% of their market value and were slated for reassessment in 1987.

Petitioners also filed petitions identical to that involved herein in the years 1985 and 1986, which actions have been stayed by the trial court. Members of a local homeowner group known as Tulsans Against Property Tax Discrimination likewise paid their taxes under protest and their actions have likewise been stayed. As of August 26, 1986, petitioners alleged that the amount of protested taxes exceeded $5 million. Protested taxes are held in escrow and are not allotted in the county budget.

As a result of the disparate treatment for older and newer properties, owners of post-1979 property have been taxed for several years at an effective rate approximately twice as high as the rate for pre-1979 property. The county assessor argued, in part, that her assessments were proper based on 1984 amendments to the Oklahoma *ad valorem* tax code, which she misinterpreted as giving her until January 1, 1987 to be in compliance with the requirements of the code. The district court ex-

pressed serious reservations whether the assessor was following the intent of the legislature, and the Oklahoma Supreme Court ultimately ruled that her interpretation of the statute was incorrect. The court below held that the January 1, 1987 deadline was not a moratorium on the assessor's continuing obligation to revalue property and did not temporarily excuse continuous revaluation. App. A-7.

Notwithstanding the willful and consistent course of conduct by the assessor, which resulted in a 100% disparity of tax rates paid by owners of older and newer property, the court below held that her actions did not constitute "systematic and intentional discrimination" because she believed (albeit erroneously) the discrimination to be authorized by state law. App. A-13. The court emphasized that the valuation of petitioners' property was correct and only the valuation of third parties' property was incorrect. Thus, although acknowledging the county assessor's violation of the state tax code, the court denied tax refunds to petitioners and ruled that their only remedy was to cause the assessments of the undervalued pre-1979 property belonging to third parties to be raised. App. A-12. Three justices of the Oklahoma Supreme Court dissented in part, on the ground that petitioners' property was not taxed equally with other property as required by law, and that petitioners were therefore entitled to a refund. App. A-20.

Petitioners sought rehearing and argued that the holding below was contrary to this Court's decision in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, West Virginia,* 109 S. Ct. 633 (1989). The Oklahoma Supreme Court filed a supplemental opinion concluding, somewhat tautologically, that *Allegheny Pittsburgh* was not controlling because the county assessor did not violate the Equal Protection Clause. App. A-21. The court below buttressed its conclusion by relying

on language in *Allegheny Pittsburgh* distinguishing "transitional delay in adjustment of assessment value" as not violative of the Equal Protection Clause. App. A-22, quoting *Allegheny,* 109 S. Ct. at 638.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly held that the fact that a taxpayer's property is assessed at its actual value is no defense to an equal protection challenge to the lower assessment of comparable property, and that a taxpayer who is subject to such discriminatory assessment cannot be relegated to attempting to raise the assessments of comparable properties owned by other taxpayers. *Allegheny Pittsburgh,* 109 S. Ct. at 637-639; *Hillsborough v. Cromwell,* 326 U.S. 620 (1946); *Iowa-Des Moines Nat'l Bank v. Bennett,* 284 U.S. 239 (1931); *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441 (1923). The Court has also held that disparate taxation is "intentional and systematic"—and thus in violation of the Fourteenth Amendment—when clearly disparate assessments are "made pursuant to a deliberately adopted system" and result not from possible errors of judgment but from the system itself. *Cumberland Coal Co. v. Board of Revision,* 284 U.S. 23, 125 (1931).

The court below acknowledged the uncontested facts in this case: the county assessor assessed pre-1979 property at a rate approximately half that assessed to post-1979 property, made these assessments knowingly and with full understanding of their discriminatory effects, and persisted in this course of conduct for ten to eleven years. The court below further acknowledged that the county assessor's actions were in violation of state law.

Thousands of state and local jurisdictions impose *ad valorem* property taxes each year, and challenges alleging discrimination in the levying of such taxes arise with con-

siderable frequency. Certain basic principles have been established by this Court: that discrimination occasioned by a deliberately adopted system of assessment (rather than mere errors of judgment) violates the Fourteenth Amendment; that property owners assessed on the actual value of their property are nevertheless discriminated against when others are taxed on less than actual value; and that taxpayers subject to such discrimination are entitled to have their assessments lowered to the prevailing level and cannot be relegated to merely arguing to have the assessments of all other property owners raised. These principles, so recently reaffirmed in *Allegheny Pittsburgh,* have been either ignored or misconstrued by the Oklahoma Supreme Court. If the decision below is permitted to stand, these principles will be cast aside in favor of a novel rule that provides relief to taxpayers only where they can prove that the county assessor acted with *invidious* discriminatory intent, *i.e.*, acted *because of*, rather than merely *in spite of*, the effects upon the taxpayers. Such a result would sow confusion about the relation between federal constitutional rights and state tax practices.

I. The Court Below Misapplied This Court's Precedents And Sanctioned Intentional And Systematic Discriminatory Taxation.

The court below concluded that the county assessor did not "intend to discriminate" because she claimed to have been interpreting state law to authorize the discrimination against plaintiffs and she did not demonstrate any animus or ill-will toward them. This view of what constitutes "discriminatory purpose" under an equal protection analysis was based upon language in *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 279 (1979). In *Feeney,* a gender discrimination case, the Court wrestled with the question, as in

various race discrimination cases,[1] of when facially neutral legislation evidences discriminatory animus because of a disproportionate impact upon a particular race or gender. The Oklahoma Supreme Court erred in engrafting this standard upon this Court's state taxation jurisprudence, which plainly applies a different test.

In *Southern Railway Co. v. Watts,* 260 U.S. 519, 526 (1923), this Court held that discrimination in state taxation does not contravene the Fourteenth Amendment unless it is "intentional and systematic." The decision below was based, as was the decision of the West Virginia Supreme Court of Appeals in *Allegheny Pittsburgh,* on a misunderstanding of what the "intentional and systematic" test requires. It does not require proof that the taxing authorities were actuated by evil motives, or that they deliberately manipulated data. The Court made that clear in *Cumberland Coal,* which held that a tax assessor's policy of arriving at a single valuation figure for all local property in the jurisdiction constituted intentional and systematic discrimination in violation of the Fourteenth Amendment. The Court said:

> There is no question that the assessments under review were made pursuant to a deliberately adopted system. The case is not one of mere errors in judgment in following a proper method, but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity. [284 U.S. at 25 (citations omitted).]

Here too there is no question that the challenged assessments were made "pursuant to a deliberately adopted system" which

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[1] *See, Washington v. Davis,* 426 U.S. 229 (1976); *Columbus Bd. of Educ. v. Penick,* 443 U.S. 449 (1979); *City of Mobile v. Bolden,* 446 U.S. 55 (1980).

the assessor believed to be valid under state law.[2] In fact, the assessor's formal Plan of Revaluation, required annually by the State Tax Commission, incorporated the discriminatory design to forestall revaluation of the older residences for ten to eleven years. Tr. 107-108.

Other state courts of last resort have held that disparities in valuation caused by policies similar to that adopted by the county assessor in this case constitute unlawful taxation. For example, in *Duval v. City of Manchester,* 286 A.2d 612 (N.H. 1971), the Supreme Court of New Hampshire invalidated a procedure of reassessing property sold during the previous year. In view of the resulting disparities in valuation compared with unsold but otherwise comparable property, the court found the taxes levied as a result of this procedure unlawfully discriminatory.

Similarly, *Board of Assessors of Weymouth v. Curtis,* 375 Mass. 493, 378 N.E.2d 655 (1978), held invalid a reassessment procedure triggered by improvements made to a particular parcel since the establishment of a 1968 tax base. The court in *Curtis* held that, in light of the disparities in valuation caused by this practice, the taxpayers had carried their burden of establishing illegal discrimination:

> While the practice of not revaluing individual properties after the 1968 revaluation, unless improvements

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[2] As one state Supreme Court put it, there is systematic discrimination whenever each appraisal is not "part of a systematic and definite plan which provides that all similar properties be valued in a like manner." *Ernest W. Hahn, Inc. v. County Assessor,* 92 N.M. 609, 592 P.2d 965, 969 (1978). Even regularly *excusing* from taxation all taxpayers except a particular one constitutes systematic discrimination for purposes of the Fourteenth Amendment. *See Gosnell Development Corp. v. Arizona Dept. of Revenue,* 744 P.2d 451, 453-454 (Ariz. App. 1987).

> were made, may be an acceptable method of maintaining a fair assessment balance between unimproved properties, it is certainly prejudicial to those properties, like the parcels in question in the instant cases, that for one reason or another are reassessed after 1968 at figures equal to their full value as of the time of assessment. [378 N.E.2d at 660.]

These cases and others demonstrate that when disparities in state taxation result from a particular assessment approach or policy, as opposed to the exercise of the assessor's judgment in appraising particular parcels, the "intentional and systematic" test is met. There is no need to establish invidious discrimination; merely an intentional overassessment of a class of property as compared with the assessment of like property in the rest of the county.

Even where all property in the jurisdiction will eventually be subject to reappraisal, the courts have found unlawful discrimination. *See Sparks v. McCluskey,* 84 Ariz. 283, 327 P.2d 295 (1958); *Ernest W. Hahn,* 592 P.2d at 968-969. Contrary to the opinion of the Oklahoma Supreme Court, this is not a case of "transitional delay in adjustment of assessment value." App. A-22. Rather, the disparity and the length of time involved exceed that previously held by this Court to be excessive under the Fourteenth Amendment. *See Sioux City Bridge v. Dakota County,* 260 U.S. 441 (1922) (disparity of 100% and duration of only seven years).[3]

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[3] *See also Louisville & Nashville R. Co. v. Public Service Comm'n,* 631 F.2d 426 (6th Cir. 1980), *cert. denied,* 450 U.S. 959 (1981); *Weissinger v. Boswell,* 330 F.Supp. 815 (M.D. Ala. 1971); *Savage v. State Tax Comm'n,* 722 S.W.2d 72 (Mo. 1986).

II. The Holding Below That The Only Remedy Is To Raise The Assessments Of Other Taxpayers Directly Conflicts With Numerous Decisions Of This Court.

The court below held that petitioners could not seek to have their assessments lowered to prevailing levels but must instead cure any unconstitutional discrimination by attempting to have the assessments of all other taxpayers raised. Emphasizing that the assessments in question were based on the actual value of petitioners' properties and that lowering the valuations would only compound the county assessor's violation of law, the court pronounced that petitioners were remitted to filing an action for a writ of mandamus to compel the assessor to follow her statutory duties. This holding conflicts with several decisions of this Court, beginning with *Sioux City Bridge,* 260 U.S. at 446, to which this Court has adhered ever since, without so much as a solitary dissent. In *Iowa-Des Moines Nat'l Bank,* for example, Justice Brandeis, writing for a unanimous court, deemed it

> well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. * * * Nor may he be remitted to the necessity of awaiting such action by the state official upon their own initiative. [284 U.S. at 247.]

Again, in *Hillsborough v. Cromwell, supra,* a unanimous Court recognized that Fourteenth Amendment protection for taxpayers is not vindicated by a state remedy that restricts the complaining taxpayer to proceedings to raise the taxes of others. While acknowledging that the right at issue was the right to equal treatment and that the taxpayer could not object if equality were achieved by raising the taxes of others rather than lower-

ing his own, the Court continued: "The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." 326 U.S at 623 (citations omitted).

Only last term, this Court's opinion in *Allegheny Pittsburgh* made the point yet again. *See* 109 S. Ct. at 639. Yet in spite of the repeated admonitions by this Court, the court below refused to follow the law. Under these circumstances, summary reversal is appropriate to reaffirm the principles to which the court below paid no heed.

III. The Questions Presented Are Important And Recurring And Need To Be Firmly Settled.

The type of tax discrimination described in this case and in *Allegheny Pittsburgh* is commonly known as "welcome stranger" assessment. In this era of cutbacks in federal assistance, state and local governments throughout the country are heavily dependent upon the revenues collected through property taxes. At the same time, however, those upon whom this tax burden falls have instigated several well-publicized "tax revolts," resulting in practical as well as formal limitations on the authority to raise tax rates.[4] Elected officials everywhere find themselves under constant political pressure to finance schools and improvements without increasing the tax burden on the voters.[5]

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[4] *See* Lowery, *After the Tax Revolt; Some Positive, If Unintended, Consequences,* 67 Soc. Sci. Q. 736 (1986).

[5] Despite the legislative direction that all property be assessed at its true value, the Tulsa County Assessor campaigned and won on a platform to cut taxes.

Continued on next page

The decision below, if permitted to stand, offers an alluring solution to this quandary: taxing newcomers at discriminatory rates with impunity simply by failing to understand the law. This "solution," however, eviscerates the doctrine established by *Allegheny Pittsburgh* and earlier cases and constitutes an end run around the Fourteenth Amendment guarantee of equal protection. Neither hardship on the State from having to relinquish taxes not truly owed by the taxpayer nor hardship on other taxpayers from having to pay taxes required to equalize disparate treatment[6] can relieve the required to equalize disparate treatment can relieve the State of its obligations to take appropriate action to eliminate discrimination. The court below upheld the discriminatory tax treatment here at issue only by ignoring this Court's holdings that taxpayers assessed at full value suffer unconstitutional discrimination when other taxpayers are assessed at less than full value, that such discrimination is "intentional and systematic" when it results from a deliberately adopted assessment system, and that a taxpayer who is overassessed cannot be forced to raise the assessments of all other taxpayers to obtain relief.

In sum, as can be seen by reference to *Allegheny Pittsburgh* and other cases cited herein, the decision below is not simply an isolated instance of a state court's failure to vindicate a federal

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Footnote 5 continued from previous page

Tr. 93. She was quoted in press accounts made part of the record below as viewing the revaluation requirement as a "dumb law", and as vowing not to follow it "until they make me." Tr. 395, 396. Her own press release described how she would administer the law: "I'll follow the law that way, too—in favor of our homeowners as much as I can." Tr. 111. The Assessor avoided revaluation until 1987 and 1988 and won re-election in 1986 by more than a 2 to 1 margin.

[6] *See Gosnell*, 744 P.2d at 452.

constitutional right. It is, rather, symptomatic of an important and recurring disregard by state courts of an area of this Court's jurisprudence—a disregard meriting not only review by this Court but summary disposition as well.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

No. 66,296

TONY LEE ADAIR, et al.,
Appellants,

v.

CHERYL CLAY, in her capacity
as Assessor, Tulsa County,
State of Oklahoma, et al.,
Appellees.

FILED
SUPREME COURT
STATE OF OKLAHOMA
JUL 5, 1988
JAMES W. PATTERSON
CLERK

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA
Honorable Ronald Schaffer, Judge

Appellants-taxpayers seek a percentage refund of ad valorem taxes paid under protest, alleging discriminatory valuation. The trial court denied the refund and found that the practices of assessment under attack do not constitute intentional violation of the essential principle of practical uniformity.

JUDGMENT OF THE TRIAL COURT AFFIRMED.

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HODGES, J.

This case presents two issues arising out of the valuation placed on certain properties for the assessment of ad valorem taxes by the County Assessor. First, it poses the question whether appellees-public officials responsible for the execution of the ad valorem tax laws in Tulsa County, Oklahoma, complied with state statute. Second, the case raises the question whether there has been any plan or intent to systematically or intentionally discriminate against appellants-taxpayers by appellees. The trial court ruled in favor of appellees and against appellants, finding the practices of assessment under attack were in compliance with statute, and further do not constitute intentional discrimination nor amount to an intentional violation of the essential principle of practical uniformity. We now affirm the trial court's judgment despite our conclusion that the County Assessor failed to follow her statutory mandatory duties.

FACTS

Appellants brought two actions, which were consolidated for trial, seeking a refund of ad valorem taxes for the tax years 1983 and 1984, pursuant to 68 O.S. 1981 § 2461, and alternatively 68 O.S. 1981 § 2469. Appellants also sought recovery under 42 U.S.C. § 1983. They requested a refund of taxes equal to the difference between the amounts paid and the amounts that would have been paid if the valuations of appellants' properties had been equalized to the level of the effective assessment ratio of Tulsa County for the tax years 1983 and 1984, and also requested a reasonable attorney's fee and costs. Appellants consist of two groups. The first group includes taxpayers with properties constructed after 1979, and the second group is comprised of owners of commercial properties whose properties have been revaluated after 1979 as part of the cyclical revaluation program. Appellees include the Commissioners for the County of Tulsa, the County Assessor, the County Board of Equalization and the County Treasurer, who were all named as defendants in their official capacities.

Appellants contend appellees deprived them of their rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution and Section 7 of Article II of the Oklahoma Constitution through inequitable property tax assessments. Appellants allege appellee Cheryl Clay, the current Tulsa County Assessor, has selectively revalued or newly valued appellants' properties at 100% of their fair cash value, while other properties, constructed prior to 1979, are valued at far less than 100% of their fair cash value. Further, they allege Clay does not intend to place any revaluations of pre-1979 homes, the alleged favored class, on the tax rolls until January 1, 1987. Although Clay has applied the same assessment ratio and millage rates against all properties, the failure to

revalue all properties has resulted in a higher effective assessment ratio being applied against appellants, than the effective assessment ratio applied against the owners of pre-1979 homes.

Appellants also claim that the assessments violated their rights to uniformity of taxation upon the same class of subjects under Section 5 of Article X of the Oklahoma Constitution, and to equalized ad valorem real property taxes as provided in the Ad Valorem Tax Code, 68 O.S. 1981 § 2401 *et seq.*

The trial was bifurcated and the only issue considered was whether appellants' rights had been violated. In the event that liability is established, the parties stipulated that the fair cash values of appellants' properties were correct, and appellants (who were assessed at a rate of 15% of their fair cash value of their properties) would receive as a refund 35% of the taxes paid under protest for the year 1983, and 40% of the taxes paid under protest for the year 1984.

The case was tried before the district court without a jury. The trial court found in its Findings of Fact and Conclusions of Law as Modified that the Assessor's office, under the previous assessor Wilson Glass, revalued the bulk of residential properties built prior to 1979 and placed the new values on the tax rolls in the tax years 1977 and 1978. Cheryl Clay was elected Assessor of Tulsa County in 1978 to take office January 1, 1979. The Assessor's office completed revaluation of all properties within Tulsa County between 1977 and 1982. The parties stipulated that Assessor Clay's office has not placed any new values on the tax rolls for residences built prior to 1979. However, these residences were to be revalued and placed on the tax rolls by January 1, 1987, pursuant to a revaluation plan which was submitted to the Oklahoma Tax Commission in 1981 and 1983. Under the plan all properties within the county were to be

revalued by 1987 for application to the assessment roll of that year.

The trial court further found Tulsa County has complied with all requirements, standards and directives of the State Board of Equalization in regard to revaluation. It noted that the Assessor has no discretion in that 68 O.S. 1981 § 2427(d) (amended 1985) requires him/her to place newly built homes or any improvements thereon according to the value of those improvements on buildings on the tax rolls for the next ensuing year. Also, the trial court observed that under 68 O.S. Supp. 1985 § 2481.1(B) all property in the county must be revalued by January 1, 1987. It recognized that the Oklahoma Constitution does not require an assessor to assess property on a certain legislative mandated cycle. And 68 O.S. 1981 § 2481.1, as construed by *Melvin v. Dunn, 607 P.2d 694 (Okla. 1980) and State ex rel. Tulsa Classroom Teachers Association, Inc. v. Board of Equalization, Tulsa County,* 600 P.2d 861 (Okla. 1979), requires a systematic program of revaluation be done on a continuous basis of all property in the county at least once during each five-year cycle and that an act of revaluation has not been completed until and unless the county assessor has placed the new value on the assessment roll. The trial court concluded the order in which revaluations in Tulsa County have occurred have not been arbitrary or purposely designed to discriminate against any of appellants or any sub-group to which they may belong. It also found Assessor Clay has complied with the strict letter of the law but noted "there is grave question whether the full intent of the legislature has been properly followed."

We first consider appellees' alleged noncompliance with state statute and then their alleged violation of appellants' rights under the Oklahoma and United States Constitutions.

I.

NONCOMPLIANCE WITH THE OKLAHOMA AD VALOREM TAX CODE

We must initially address the question of whether the Assessor complied with state statute. Title 68 O.S. 1981 § 2481.1, as it existed prior to its amendment which was effective October 1, 1984, provided in pertinent part:

> "Each county assessor shall commence . . . no later than January 1, 1969, a comprehensive program of revaluation of all taxable property within his respective county. Such programs shall progress at a rate which will result in the revaluation of all taxable property within the county before January 1, 1972. Each assessor shall thereafter maintain an active and systematic program of revaluation on a continuous basis and shall establish a revaluation schedule which will result in revaluation of all taxable property within the county at least once each five years."

Under § 2481.1 the first revaluation period was required to be completed before January 1, 1972; the second period before January 1, 1977; the third period before January 1, 1982; and the fourth period before January 1, 1987. The present dispute concerns the fourth five-year revaluation period which began January 1, 1982, and ran through December 31, 1986.

Section 2481.1 was amended, effective October 1, 1984, by the addition of subsections B and C, which read as follows:

> "B. All counties shall be in compliance with the provisions of this section by January 1, 1987. A county shall be deemed in compliance with this section if the county assessor has completed the revaluation of all of the taxable real property in the county by January 1, 1987, and in accordance with the uniform procedures and standards for appraisal of real property adopted

by the Oklahoma Tax Commission.

> "C. Counties may implement the increases in assessed valuations of revalued real property in the manner provided for in Section 6 of this Act. [68 O.S. Supp. 1984 § 2427.2]." (Emphasis added).

We do not construe the above amendment to § 2481.1 as a moratorium on the Assessor's continuing requirement of revaluation until January 1, 1987. While the 1984 amendment to § 2481.1 does not expressly state that the county assessor must continue to revalue property between the enactment of the amendment and January 1, 1987, it is clear from the language of the entire Ad Valorem Tax Code. The amendment provides for a new deadline of January 1, 1987, when revaluation must be "completed." Section 2427.2 provides for graduated increases in assessed valuation of real property revalued as part of the county revaluation program for assessments prior to January 1, 1987, to allow for an orderly compliance with the mandate of §§ 2481.1 through 2481.11. Section 2481.1(B) simply places upon the county assessor a deadline for the revaluation program continuously performed. Such deadline, however, does not temporarily excuse continuous revaluation. To find otherwise would create disparity, rather than eliminate it. We do not interpret legislation as conflicting where such legislation may be construed as harmonious. *Grand River Dam Auth. v. State*, 645 P.2d 1011, 1019 (Okla. 1982).

This Court recently in *Cty. Bd. of Equal. v. School Dist. No. 1*, 743 P.2d 1076, 1079 (Okla. 1987), reaffirmed our previous holding in *Melvin v. Dunn*, 607 P.2d 694, 696-697 (Okla. 1980), wherein we construed § 2481.1 (now § 2481.1(A)) stating:

> "The current statute, 68 O.S. 1971 § 2481.1 provides for and requires valuation at *regular intervals*. All

> property must be valued every five years under the last cited section. If such revaluation proceeds through the several classes of property in the same order as the last, all property will be valued every five years and it does not matter where the process begins, but § 2481.1 clearly provides that the process must be begun again every five years. All property is *revalued regularly* and that process must have a starting point." (Emphasis added).

It is not disputed the Assessor followed the mandates of 68 O.S. 1981 § 2427(d) for the parties stipulated that appellants' new residential properties were correctly placed on the tax rolls at fair cash value after they were completed pursuant to that section. Nor is the constitutionality of § 2481.1 in issue as that statute was upheld in *Melvin v. Dunn, supra,* against an equal protection challenge. Instead, appellants attack the Assessor's construction of § 2481.1 which was apparently adopted by the trial court. Appellants contend the residences revalued and placed on the tax rolls in 1977 and 1978 should have been revalued no later than January 1, 1982, and January 1, 1983, respectively. Appellees, on the other hand, assert that the older homes were revalued during the third five-year period ending on December 31, 1982; and, thus, need only to be revalued sometime during the fourth five-year period ending on December 31, 1986. Appellees' construction of § 2481.1 is incorrect. As we stated in *Melvin,* 607 P.2d at 697:

> "[E]qual treatment is established by regular, cyclical revaluation. The equality of such a system as it operates on the taxpayer is afforded by revaluation every five years, for if one class of property is revalued first in this five year valuation, and revalued last in the next cycle, unequal treatment would be inflicted on the citizenry, as one class would be valued only after ten years had passed."

Assuming revaluation of all property occurred January 1, 1987, the pre-1979 homes were revalued approximately ten years from the time of the previous revaluation. The pre-1979 homes have not been revalued regularly as mandated by the Legislature. Consequently, we find the trial court erred in finding the Assessor has complied with her statutorily prescribed duties.

Appellants urge that they are entitled to a percentage refund under the Ad Valorem Tax Code by reason of Clay's failure to properly revalue the pre-1979 homes. In support of this position, appellants cite *State v. State ex rel. Shull,* 142 Okl. 293, 286 P. 891 (1930), in which this Court held the district court had jurisdiction where the board of county commissioners had failed to correct an erroneous assessment which was merely inequitable, rather than illegal under the Fourteenth Amendment to the Federal Constitution. In *Shull,* the parties stipulated there was no systematical intentional valuation of the property of defendant at a higher valuation than other property. This Court upheld an equalization downward below fair cash value in order to equalize the taxpayer's taxes with other taxpayers whose properties were uniformly assessed at a percentage of their fair cash values. *Shull's* grant of an equalization downward below fair cash value represented the law prior to the present statutory scheme set forth in 68 O.S. 1981 § 2481.1 and, therefore, does not control the disposition of the present case. The property in *Shull* was similar real property within the county and should have been similarly assessed; whereas, the newer homes and commercialproperties of appellants in this case are not similar to the pre-1979 homes under the statutory scheme of revaluation pursuant to § 2481.1. *Cty Bd. of Equal. v. School Dist. No. 1,* 743 P.2d at 1079.

To grant appellants' request for a refund would in effect allow a "roll-back" of their fair market cash values to pre-1979

estimates contrary to the plain language of Section 8 of Article X of the Oklahoma Constitution and as prescribed by the statutes, as interpreted by recent decisions of this Court. Title 68 O.S. 1981 § 2459(a) requires the assessed valuation of real property to conform to the fair cash value of said property. And, 68 O.S. 1981 § 2471 requires the assessor to add the latest valuation of property to the tax rolls without delaying until all property has been revalued. *Cty. Bd. of Equal. v. School Dist. No. 1, supra; State ex rel. Tulsa Classroom, Teacher's Association, Inc. v. Board of Equalization, Tulsa County,* 600 P.2d 861, 862 (Okla. 1979). As previously mentioned, § 2427(d) requires the assessor to place new residential properties on the tax rolls for the next ensuing year.

Appellants cannot seek to improve their position by attempting to reduce the fair cash value of their properties to the date of the pre-1979 estimates. Because of the fact the pre-1979 homes were not revalued as required by statute, lowering appellants' valuations would only compound Assessor Cheryl Clay's violation of statutory mandates. And, in essence, the dictates of our constitutional, statutory and case law which require new residential property be valued at fair cash value and placed on the tax rolls for the next ensuing year would be virtually of no import. *Cty Bd. of Equal. v. School Dist. No. 1,* 743 P.2d at 1080.

Oklahoma statutes provide three methods by which a taxpayer may seek relief from an unjust property tax assessment. Under the administrative remedy provided in 68 O.S. 1981 § 2459(a), the county board of equalization has only the authority to equalize, correct and adjust the assessed valuation of real property "by raising or lowering the valuation . . . to conform to the fair cash value thereof." *Cantrell v. Sanders,* 610 P.2d 227, 229 (Okla. 1980). *See also Cty. Bd. of Equal. v. School*

Dist. No. 1, supra. Under 68 O.S. 1981 § 2479, the board of tax roll corrections is authorized to hear and determine complaints with regard to specific enumerated instances. Further, 68 O.S. 1981 § 2469 provides for a direct suit for refund "[i]n all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal." (Emphasis added). Here, appellants' properties were legally assessed at fair cash value. Thus, under the facts in the present case appellants may not seek a percentage refund under any of the statutory remedies.

Moreover, this Court may not grant appellants a refund of ad valorem taxes paid on property correctly valued where the Legislature has not provided a statutory remedy. The Oklahoma Constitution vests the whole matter of taxation exclusively within the power of our Legislature as limited by the Constitution. Okla. Const. art. X § 12; *City of Sand Springs v. Dept. of Pub. Wel.,* 608 P.2d 1139, 1148 (Okla. 1980). *A fortiori,* the right to a refund can arise only by legislative enactment. *Weil-McLain Co. v. Collins,* 395 Ill. 503, 71 N.E.2d 91 (1947). The courts may only interfere when there is a clear violation of the constitution or statute. The matter of taxation is not within the jurisdiction of the judiciary and only the Legislature can declare when taxes may be refunded absent a constitutional violation. *Board of Com'rs of Oklahoma County v. Ryan,* 107 Okla. 278, 232 P. 834 (Okla. 1925); *Board of Com'rs v. Hammerly,* 85 Okla. 53, 204 P. 445 (1922). Here, the assessments of appellants' property are legal; thus, no recovery can be had under § 2469. Because the Legislature has not afforded appellants a statutory remedy for a refund this Court is not authorized to grant appellants a judicially created remedy for a refund of taxes properly assessed.

In this particular situation the only judicial remedy a taxpayer has is to seek the remedy of mandamus in district court to compel the Assessor to follow her mandatory statutory duties. *State ex rel. Tulsa Classroom,* 600 P.2d 861 (Okla. 1979). *State of Okla. ex rel. Poulos v. state Bd. of Equal.,* 552 P.2d 1134 (Okla. 1975). Appellants here failed to seek mandamus in the instant case; thus, mandamus is not an issue presently before us.

Notwithstanding the trial court's erroneous determination that the Assessor was in compliance with statutory ad valorem taxation procedures, we find the ultimate result reached by the trial court, *i.e.,* denial of refunds, is correct.

II.

FEDERAL AND STATE CONSTITUTIONAL CLAIMS

We now turn to appellants' state and federal constitutional claims.

Appellants contend that appellees' unequal application of the Ad Valorem Tax Code, although fair on its face, violated their rights: (l) to the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution and (2) to uniformity of taxation upon the same class of subjects as guaranteed by Section 5 of Article X of the Oklahoma Constitution.[1]

A. THE EQUAL PROTECTION CLAUSE

The taxpayers did not demonstrate intentional discrimination violative of the Fourteenth Amendment by showing the failure of the Assessor in following 68 O.S. 1981 § 2481.1, and as subsequently amended. Section 2481.1 is constitutional.

---

[1] Appellants also asserted as error a denial of procedural and substantive due process. This allegation of error was not urged in briefs on appeal and is deemed waived. *Hawkins v. McElhanon,* 315 P.2d 667, 668 (Okla. 1957).

Melvin v. Dunn, 607 P.2d 694 (Okla. 1980). As the United States Supreme Court explained in *Snowden v. Hughes,* 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1944):

> "[W]here the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute is not without more a denial of the equal protection of the laws.
>
> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

Mistaken performance in administering § 2481.1 does not, by itself, constitute an equal protection violation. A discriminatory purpose or intent is required to demonstrate a violation of the Equal Protection Clause. *Hunter v. Underwood,* 471 U.S. 222, 227-228, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985).

The United States Supreme Court in *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 6 L.Ed.2d 70 (1979), defined "discriminatory purpose:"

> " 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. See, *United Jewish Organizations v. Cary,* 430 U.S. 144, 179, 97 S.Ct. 996, 51 L.Ed.2d 229 (concurring opinion). It implies that the decisionmaker, . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of,' its adverse effects upon an identifiable group."

The testimony at trial revealed that the Assessor desired to lower the assessed valuation of post-1978 homes to less than their fair cash value, but was prohibited from accomplishing this by a judicial order. The Assessor testified that the lower value assessed to pre-1979 homes was unfair to the new businesses and homes assessed after 1978 at fair cash value but testified that no intent to discriminate was present. The record does not contain any testimony indicating that the Assessor failed to revalue pre-1979 homes "at least in part 'because of' . . . its adverse effects" on the owners of newer homes and commercial properties. Instead, the record reveals that the Assessor desired to lower the evaluations of the newer properties.

The Assessor determined not to revalue the pre-1979 homes until the law (as she claimed to understand it) required her revaluation. In brief, the Assessor thought she could utilize § 2481.1 to keep taxes low for pre-1979 homes, but was unable to perceive a similar method to evade placing new homes and commercial properties on the tax rolls at less than fair cash value. Thus, that part of the trial court's judgment finding no acts of intentional discrimination is not against the clear weight of the evidence, and the lower court must be affirmed insofar as it found no violation of the Equal Protection Clause.

B. THE UNIFORMITY CLAUSE

Appellants also assert the Assessor violated their rights under the Uniformity Clause contained in Article X, Section 5 of the Oklahoma Constitution. We have consistently held that this constitutional provision does not apply to the valuation of property, but rather to the rate of taxation. *Cty. Bd. of Equal. v. School Dist. No. 1, supra; Continental Oil Co. v. State Board of Equalization,* 570 P.2d 315, 319 (Okla. 1977) and *Blake v. Young,* 128 Okl. 153, 261 P. 923, 925 (1927), control our resolution of this proposition. Ad valorem tax assessment entails two

steps: (l) the valuation of property, and (2) the application of an assessment percentage to that value. *Cantrell v. Sanders,* 610 P.2d 227, 229 (Okla..1980). The present action has nothing to do with the determination of the rate of taxation or selection of assessment ratios. Thus, this argument is not well founded and may be disposed of summarily.

III.

CLAIMS UNDER 42 U.S.C. § 1983

Appellants also assert they are entitled to relief pursuant to the remedy provided by 42 U.S.C. § 1983, claiming the deprivation of federal constitutional rights. Section 1983 provides in part as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the Constitution and laws,* shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added).

Appellants allege appellees acted under color of state law to deprive them of their rights to equal protection. Appellants argue that this gives them a cause of action in state court under § 1983, independent of their state law remedies.

Because we hold that appellants have failed to prove intentional or purposeful discrimination, a crucial element to their § 1983 action, we need not decide whether § 1983 presents an alternative remedy for asserting appellants' federal constitutional claims.

CONCLUSION

Because no statutory remedy for a tax refund exists in this case, this Court may not create a judicial legal remedy for a tax refund as the matter of taxation is exclusively within the power of the Legislature. We affirm the trial court's determination that the appellants have not been denied equal protection under the United States Constitution, and also affirm that court's judgment that the Uniformity Clause, Article X, Section 5 of the Oklahoma Constitution was not violated. Therefore, the trial court's denial of refunds is accordingly affirmed.

JUDGMENT OF THE TRIAL COURT AFFIRMED.

Concur: HARGRAVE, V.C.J., HODGES, LAVENDER, SIMMS, OPALA, WILSON, JJ.

Concur in Part, Dissent in Part: DOOLIN, C.J., SUMMERS, MEANS, Special Justice, sitting in place of Justice Kauger who recused.

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

No. 66,296

TONY LEE ADAIR, et al.,
Appellants,
v.
CHERYL CLAY, in her capacity as
Assessor, Tulsa County,
State of Oklahoma et al.,
Appellees.

FILED
SUPREME COURT
STATE OF OKLAHOMA
JUL 5, 1988
JAMES W. PATTERSON
CLERK

SUMMERS, J., Concurring in part and dissenting in part.

I concur in the Court's treatment of the taxpayers' Federal and State Constitutional claims. And although I concur in the Court's holding that the Assessor failed to comply with her statutorily mandated duties, I must respectfully dissent from that part of the opinion denying the aggrieved taxpayers their refunds.

In *Melvin v. Dunn*, 607 P.2d 694 (Okl. 1980), we stated the following:

> "In the previous discussion of appellants' equal protection argument, it was pointed out that equal treatment is established by regular, cyclical revaluation.

> The equality of such a system as it operates on the taxpayer is afforded by revaluation every five years, *for if one class of property is revalued first in this five year valuation, and revalued last in the next cycle, unequal treatment would be inflicted on the citizenry, as one class would be valued only after ten years had passed.* Id. 607 P.2d at 697 (Emphasis added).

The majority finds the assessment of taxes to be correct as to the protesting taxpayers because the taxpayers' new properties were placed on the tax rolls at fair cash value. However, the tax as to them was *illegal* since it was not in conformity with 68 O.S. 1981 § 2481.1, and denied the taxpayers their statutorily created right to equal treatment.

Taxpayers are provided a remedy where the state imposes an illegal tax.

68 O.S. § 2469 states:

> "In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the Court having jurisdiction thereof, and they shall have precedence therein. If, upon final determination of any such suit, the Court shall determine that the taxes were illegally collected, as not be-

> ing due and owing, the Court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the Court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

Most of the appealing taxpayers have paid their taxes under protest in full compliance with this section. The parties have stipulated to the amounts of refund recoverable by each in the event liability was established.

In *Bonaparte v. American Vinegar Mfg. Co.*, 17 P.2d 441 (Okl. 1932) we quoted with approval the following:

> "In other words, the general scope of the jurisdiction and powers of the taxing authorities is to impose taxation upon property assessed at its true cash value, and at a rate not exceeding the maximum fixed by law; and when the authorities have proceeded and acted within the scope of their authority as thus defined, and property has not been valued for taxation beyond its true cash value, or a greater rate of taxation levied upon such value than that authorized by law, the owner has not been injured, and cannot be heard to complain, *provided his property has been taxed equally and uniformly with other property in the taxing district.*" *Id.* 17 P.2d at 444, (quoting *Wallace v. Bullen*, 52 P. 954, 958 (Okl. 1896)). (Emphasis added).

The property of the protesting taxpayers herein was not taxed equally as required by 68 O.S. 1981 § 2481.1 and *Melvin v. Dunn*, supra. The protesting taxpayers were burdened with a disproportionate share of maintaining governmental institutions.

The Oklahoma Constitution provides that a remedy shall be provided for every legally cognizable injury. Okla. Const.

Art. II, § 6. The taxpayers could not receive relief from this inequitable treatment by appearing before the Tulsa County Board of Equalization and requesting lower assessed values as to their property. *Tulsa County Board of Equalization v. School District No. 1 of Tulsa County,* 743 P.2d 1076 (Okl. 1987).

A proceeding pursuant to a prior version of 68 O.S. 1981 § 2469 was described as equitable in nature in *Bonaparte v. American Vinegar Mfg. Co.,* 17 P.2d 441 (Okl. 1932). I would hold that the equitable remedy afforded by § 2469 allows this suit to recover tax refunds for the inequitable treatment received by these taxpayers who have complied with the requirements of that section.

I am authorized to state that Chief Justice Doolin and Special Justice Means share the views expressed herein.

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

No. 66,296

TONY LEE ADAIR, et al.,
Appellants,
v.
CHERYL CLAY,
in her capacity as Assessor,
Tulsa County, State of Oklahoma, et al.
Appellees.

FILED
SUPREME COURT
STATE OF OKLAHOMA
SEPT. 20, 1989
JAMES W. PATTERSON
CLERK

SUPPLEMENT TO OPINION

HODGES, J.

Appellants' Petition for Rehearing has called our attention to the United States Supreme Court's recent decision in *Allegheny Pittsburgh Coal Co. v. County Commission*, ____ U.S. ____, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989), which was handed down subsequent to the opinion in this matter. Because the constitutional violations remedied in *Allegheny* are not present in the instant facts, this appeal is not affected by that case.

In *Allegheny*, the assessor for Webster County, West Virginia, apparently on her own initiative, taxed petitioners on the full value of their property but undervalued neighboring

comparable property. Petitioners' property was assessed based upon the recent purchase price while only minor modifications were made in the assessments of land that had not been recently sold. As a result, petitioners were taxed at eight to thirty-five times the rate applied to comparable properties. The assessor's adjustment policy would have required more than 500 years to equalize the assessments. *Id.* 109 S.Ct. at 637.

The Allegheny court explained that "the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners." *Id.* 109 S.Ct. at 638. It was noted that *Allegheny* was "not an example of transitional delay in adjustment of assessment value" but rather the assessor had intentionally and systematically undervalued property of owners within the same class as petitioners in violation of the equal protection clause. *Id.* The Court concluded that the equal protection violation could not be remedied by forcing petitioners to seek an upward revision of the taxes of other members of their class.

Unlike *Allegheny,* the present appeal does not involve intentional and systematic undervaluation of property in violation of the equal protection clause. The assessor applied the same assessment ratio to all properties. Because no equal protection violation has occurred, the *Allegheny* decision does not affect this appeal.

HARGRAVE, C.J., OPALA, V.C.J., LAVENDER, SIMMS, DOOLIN, and WILSON, JJ., concur.

MEANS, Special Justice, sitting in place of KAUGER, Jr., concurs in Supplement to Opinion only.

KAUGER, J., recused.

SUMMERS, J. dissents.

APPENDIX B

IN THE DISTRICT COURT FOR TULSA COUNTY
STATE OF OKLAHOMA

Case No. CJ-84-5227
C-83-3016

TONY ADAIR et al.,
Plaintiffs,

vs.

CHERYL CLAY, et al.,
Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS MODIFIED

This matter was tried to the Court on December 16 and December 17, 1985, and was continued until January 13, 1986, to its completion.

This Court heard testimony from 20 witnesses and received 61 exhibits during the course of the trial.

The Court entered Findings of Fact Conclusions of Law in favor of the Defendants and against the Plaintiffs on January 16, 1986. (Incorporated in paragraphs 1-22.) Subsequently, a hearing was held on March 27, 1986 in which the Intervenor Attorney General's Motion for New Trial Motion for Modification of Findings of Fact and Conclusion of Law was sustained in part and overruled in part. (Additional Findings and Conclusions are set out in paragraphs 23-26.)

The action was brought by the plaintiffs praying for a tax refund of ad valorem taxes and for a declaration of rights between the Intervenor State of Oklahoma *ex rel,* Mike Turpen, Attorney General, and the defendant Cheryl Clay.

Certain facts were stipulated to by the parties prior to the trial and thus must be incorporated in the findings by this Court.

This issue to be decided by this Court then is to determine if the plaintiffs proved by a preponderance of the evidence that the defendants were guilty of discriminatory treatment of the same class of property within Tulsa County. This test as set out in the *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441 (1923) is whether the action being complained of amounts to an intentional violation of the essential principle of practical uniformity.

The decision of this Court finds the following facts and conclusions of law as determinative of that issue.

1. Cheryl Clay was elected Assessor of Tulsa County in 1978 to take office January 1, 1979.

2. The Oklahoma Supreme Court requires the overall assessment ratio for each county to be between 9% and 15%.

3. The Assessor's office has not placed any new values on the tax rolls for residences built prior to 1979 with the exception of:

a. Building permits;

b. The Assessor's office has added the value of improvements to some residences;

c. The Assessor's office has added approximately 7,000 residential properties "in line" which had been overlooked in the revaluation of 1977 and 1978;

d. The Assessor's office has added certain mixed properties;

e. In 1984 values of residences built prior to 1977 were increased 8.42% over those of the previous year in response to an order of the State Board of Equalization.

4. The Assessor's office, under Wilson Glass, revalued residences built prior to 1979 and placed the new values on the tax rolls in the tax years 1977 and 1978.

5. The Assessor's office has submitted plans concerning revaluation in Tulsa County to the Oklahoma Tax Commission 1982 and 1983.

6. The Assessor's office does not intend to place any new values on the tax rolls for residences built prior to 1979 until the tax year 1987.

7. In 1984 the Oklahoma Tax Commission found the Tulsa County effective assessment ratio to be 8.03%. Residences built prior to 1979 were increased to bring the Tulsa County effect assessment ratio, as found by the Oklahoma Tax Commission, to 9%.

8. The Assessor's office chose and applied 15% assessment ratio to all properties in Tulsa County in 1983 and 1984.

9. For the tax year 1983 the Oklahoma Tax Commission found the effective assessment ratio to be 9.84% and for the tax year 1984 the Oklahoma Tax Commission found the effective assessment ratio to be 9.0%.

10. The total of parcels by class from January 1, 1977 to 1984 were:

1977	Residential	131,949
	Agricultural	7,778
	Commercial	24,223

1978	Residential	133,125
	Agricultural	8,341
	Commercial	26,368
1979	Residential	141,927
	Agricultural	8,548
	Commercial	25,009
1980	Residential	147,963
	Agricultural	8,578
	Commercial	25,322
1981	Residential	150,696
	Agricultural	8,676
	Commercial	25,576
1982	Residential	153,725
	Agricultural	8,949
	Commercial	25,252
1983	Residential	164,601
	Agricultural	6,118
	Commercial	20,418
1984	Residential	168,615
	Agricultural	6,191
	Commercial	20,544

11. Between 1977 and 1982, the Assessor's office completed revaluation of all properties within Tulsa County.

12. The Assessor's office has been involved since 1982 in efforts toward the revaluation of property required to be completed in this five-year cycle.

13. It appears from the evidence presented that all properties within Tulsa County will have been revalued by 1987 and will be applied to the assessment roll of that year.

14. The Court finds that the bulk of residential properties lacking new construction were last revalued for application to the 1977 and 1978 assessment rolls.

15. The Assessor's office during both 1983 and 1984 applied a single assessment ratio of 15% to all values of properties on the assessment roll to arrive at those properties' assessed valuations.

16. The revaluation plan of the Tulsa County Assessor's office does not contemplate the development and placement of any new values on the tax rolls for property lacking new construction before the 1987 assessment roll.

17. All owners of newly built properties are taxed on current inspections and valuations of their properties. These values will remain until the property is again revalued.

18. Tulsa County has complied with all requirements, standards, and directives of the State Board of Equalization in regards to revaluation.

19. The plan submitted by the Tulsa County Assessor to the Oklahoma Tax Commission will achieve revaluation in Tulsa County by January 1, 1987.

20. Title 68 Oklahoma Statutes § 2427(d) requires that the Assessor place newly built homes or any improvements thereon according to the value of those improvements or buildings on the tax rolls for the next ensuing year. This statute leaves no discretion to the Assessor.

21. The Court further notes that Title 68 Okla. Statutes § 2481.1 as amended requires that the Assessor complete the revaluation of all taxable real property in the county by January 1, 1987.

22. The Court does not find that the practices of assessment under attack constitute intentional discrimination or amount to an intentional violation of the essential principle of practical uniformity.

23. The Court finds that no actual case or controversy exists between the Attorney General and any of the Defendants except the Assessor, Cheryl Clay. Therefore, the Attorney General's Petition for declaratory judgment is denied as to all Defendants except the Assessor.

24. The Court finds that 68 O.S.Supp.1985, § 2481.1 (B) requires that all property in the county must be revalued by January 1, 1987.

25. The Court finds that each parcel of taxable real property must be revalued no less often than once every five years and that such revaluation must occur in the same sequence as in the prior revaluation period. *Melvin v. Dunn,* 607 P.2d 694 (Okl. 1980).

26. The Court finds that revaluation is not accomplished until the adjusted and corrected value of each respective parcel of real property is placed on the assessment roll and that the assessor is required to add the latest valuation of property to the tax rolls without delaying until all property has been revalued *Melvin v. Dunn, supra.*

The Court does not find by a preponderance of the evidence that the order in which revaluations occur in Tulsa County has been arbitrary or has been purposely designed to discriminate against any of the Plaintiffs or any sub-group to which they may belong.

While the following statements will not affect the outcome of this case, the Court nevertheless finds that the Constitution of the State of Oklahoma in Article 10, Section 8, requires that

"All property which may be taxed ad valorem shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. . . ."

Under the Constitution a county assessor must use the most recent information available when valuing property placed on tax rolls. There is no requirement that an assessor do this only on a certain legislative mandated cycle. The Statutes require that a systematic program or revaluation be done on a continuous basis of all property in the county at least once during each five-year cycle.

Thus, under the Constitution and Statutes of the State of Oklahoma, each county assessor in the state has the responsibility for the assessment of taxable property and the revaluation of those properties.

The evidence in this case shows that the Assessor of Tulsa County has complied with the strict letter of the law but there is grave question whether the full intent of the legislature has been properly followed.

The parties stipulated that the current Assessor's office has not placed any new values on the tax rolls for residences built prior to 1979 with certain stated exceptions, but that these residences will be revalued and placed on the tax rolls by January 1, 1987.

The Court has the duty to decide this case on the law and its interpretations. It is not the duty of this Court to legislate or make laws. The legislature of this state has enacted the statute that requires new homes to be valued at their actual cost and that they be placed on the tax rolls for the next ensuing year thereafter. They have seen fit to set up a five-year cycle for all revaluations and they have also mandated that all assessors shall be in compliance by January 1, 1987.

It is therefore Ordered, Adjudged and Decreed that the issues are to be found in favor of the defendants and against the plaintiffs. It is further Ordered, Adjudged and Decreed that 68 O.S. 1981, § 2481.1 as construed by *Melvin v. Dunn, supra.*, and *State ex rel Tulsa Classroom Teachers Association, Inc. v. Board of Equalization, Tulsa County,* 600 P.2d 861 (Okl. 1979) requires a County Assessor to utilize a revaluation schedule which results in all taxable property in his or her county being revalued at least once every five years and that an act of revaluation has not been completed until and unless the county assessor has placed the new value on the assessment roll.

Dated this 4 day of April, 1986.

S/S RONALD L. SHAFFER
RONALD L. SHAFFER
DISTRICT JUDGE

APPROVED AS TO FORM:

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APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

Wednesday, September 20, 1989

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

66,296 Tony Lee Adair et al. v. Cheryl Clay et al.
Rehearings denied.
Initial petition for rehearing denied, supplemental and renewed petition for rehearing denied.
CONCUR: Hargrave, C.J., Opala, V.C.J., Hodges, Lavender, Simms, Doolin, Wilson, JJ., Means, S.J.
DISSENT: Summers, J. Means, SJ. appointed in place of Kauger, J. who recused.

S/S RALPH HARGRAVE
CHIEF JUSTICE